No. 87-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,
Appellants,

v.

SANDRA C. SCHULTZ, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions representing approximately fourteen million working men and women, submits this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. This case does not concern whether the Town of Brookfield may ban trespassing, undue noise, traffic obstruction, or obstruction of access to homes in its residential neighborhoods. The Town may do so directly, and in fact has done so: these laws may be evenly applied to pickets consistent with the First Amendment. Rather, this case concerns a facial challenge to a statute that bans all picketing in front of residences, whether orderly and quiet or noisy and disruptive. As in other facial chal-

lenges this Court has entertained, the particular circumstances of the picketing in this case are therefore irrelevant.

II. In recent years, this Court has applied a tripartite forum analysis in determining whether a particular regulation on the use of government property for expressive activity is valid or not. Under that analysis, it has been clear that on public streets, sidewalks, and parks, communicative activity is presumptively appropriate, and that any regulation must be narrowly confined. Although this Court has made clear that residential as well as commercial streets are public fora, the Town now requests that residential streets be declared nonpublic fora, subject to any reasonable, nonviewpoint-based regulation.

This invitation should be declined. The public forum doctrine is based on the recognition that for the robust debate of public issue protected by the First Amendment to take place, individuals without the resources to own or use expensive national media must be able to engage in face-to-face communication with other citizens in the accessible public areas most suitable for such communication. Thus, public fora are defined not by the government's intent to permit communication, or by the tradition with regard to the use of any *particular* public property for communication, but by the generic structural attributes of streets, sidewalks and parks that make those places particularly appropriate for communication among citizens. Since residential as well as commercial streets partake of these attributes, there is no basis for abandoning this Court's clear and definite delineation of all streets and parks as public fora.

III. The picketing ordinance here at issue is not a valid time, place and manner regulation of a public forum, for the simple reason that the ordinance forwards no legitimate significant state interest. Picketing as such presents no safety hazard, and to the extent particular pickets present any such danger they can be prosecuted

under existing law. As to the concern with privacy, the interest asserted in the statute itself is not a legitimate one, for the First Amendment does not permit individuals to be protected from criticism of their behavior regarding a matter of broad public interest. Nor does the ordinance advance any privacy interest focussing on the manner of the picketing beyond the protection already provided by neutral statutes that apply across the board. Finally, there is not an adequate governmental interest in protecting neighbors from viewing or considering the picket's message, since the ordinance applies regardless of whether that message can be seen from any other house.

ARGUMENT

I. The Challenge To The Ordinance "On Its Face."

Before discussing what this case does involve on the merits, it is worth noting what is *not* involved.[1] This case is *not* about whether the Town of Brookfield may, consistent with the First Amendment, protect the tranquiity and safety of the Town's residents with regard to such matters as noise near their homes, access to their homes, trespasses upon their property or disorderly traffic on their streets. It is uncontested that public authorities may enact regulations that directly address these issues and may, in general, apply such regulations uniformly to individuals engaged in communicative activity and to individuals not so engaged. Brookfield has, in fact, acted on that understanding.

For example, the General Code of the Town of Brookfield contains ordinances prohibiting the obstruction of streets and sidewalks (§ 9.05), the creation of loud and unnecessary noise (§ 9.06), loitering (§ 9.08), the destruction of property (§ 9.09), littering (§ 9.10), trespass to land (§ 9.943.13), trespass to dwelling (§ 9.943.14),

[1] We leave the jurisdictional issue in this case to the parties.

and disorderly conduct (§ 9.947.01). *See Schultz v. Frisby*, 619 F. Supp. 792, 794-95 (E.D. Wis. 1985), *aff'd*, 822 F.2d 642 (7th Cir. 1987). Moreover, the Wisconsin Code provides, "No person shall stand or loiter on any roadway other than in a safety zone *if such act interferes with the lawful movement of traffic*," Wis. Stat. § 346.29(2) (emphasis added), and also prohibits the creation of an unreasonable risk of death or great bodily harm through placing obstacles upon a highway, tampering with traffic signs, giving false traffic signals, "or otherwise interfering with the orderly flow of traffic," Wis. Stat. § 941.03.

Thus, insofar as pickets make undue noise, obstruct traffic because of their numbers or pedestrian flow because of their behavior, or trespass upon property (Brief of the National League of Cities, As Amicus Curiae ("Cities' Br.") at 13), the pickets could be convicted under the foregoing enactments which do not regulate communicative activity as such. Of course, for any such conviction to be valid, it would have to be proven that in fact the actual conduct of the particular pickets violated the specific terms of the communication-neutral statute. For example, a picket could not be convicted of obstructing traffic on the ground that pickets sometimes obstruct traffic; actual obstruction would have to be shown. Thus, insofar as a picket was careful to move to the side of the road whenever a car came by, just as a responsible child playing softball in the street would do, he could accomplish his communicative purpose in a manner entirely consistent with the Town's legitimate interest in the free movement of vehicular traffic.

Brookfield, however, decided to go further than forbidding the possible side effects of picketing, and enacted a blanket ban upon all picketing in front of residences.[2]

[2] There are two possible reasons for proceeding in this fashion. The first is to obviate the need to prove, on an individual basis, that one of the interests also served by a communication-neutral regulation has actually been infringed. For example, there are allegations in affidavits submitted on behalf of Brookfield that trespasses on property occurred before the ordinance was passed, as evidenced by the fact that red ribbons (an antiabortion symbol) were left on the lawns and bushes of the family that was the target of the picketing. *See* JA-61 (Affidavit of Todd A. Victoria); JA-62, 63 (Affidavit of Arlene Victoria); JA-69 (Affidavit of Reid Brueser). However, the police apparently lacked any direct evidence as to who trespassed, or even whether the trespasser was one of the pickets, or, instead, someone else who opposes abortions. And trespassing was by no means an inseparable part of residential picketing here; it is undisputed, for example, that for the most part, the pickets in this case kept to the public street. By enacting a blanket ban on picketing, the Town in effect simply assumed that the pickets were responsible, directly or indirectly, for the trespasses, and attempted to create a way of prosecuting the presumed culprits without having to prove that pickets in fact committed one of the wrongs now used to justify the ban.

The second is that there is indeed something uniquely harmful about residential picketing *per se* even if the picketing were conducted in conformity with all the generally applicable regulations concerning use of the streets.

As we show *infra*, at pp. 18-29, neither of these justifications for enacting the ban is sufficient to sustain its validity.

It is this enactment—and not any other enactment that appellees may have violated in the past or could violate in the future—that is challenged here. Under the challenged ordinance appellees coud be convicted even if their picketing conformed stricty to the rules that generally govern the use of Brookfield's streets in order to protect its residents' property, liberty, physical safety, and privacy interests. Thus, to escape conviction under the ordinance, appellees would have to abandon entirely the kind of communication (carrying signs with their message) and the location (in front of the home of the person whose actions caused their protest) appellees regard as most appropriate to bringing their message before the relevant public.

Faced with this situation, appellees decided to cease their picketing on the effective date of the ordinance, and to challenge the ordinance *on its face*. In other words, appellees are contending that the only behavior proscribed in terms by the ordinance—walking back in front of a residence with a sign carrying a message—may not, consistent with the Constitution, be absolutely forbidden. Given the posture of this case, the only question before the Court is whether the residential picketing ordinance as written is a valid regulation under the First Amendment;[3] appellees' *pre*-ordinance conduct is entirely irrelevant.[4]

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[3] Appellants' suggestion that this Court may subject the ordinance to a "saving" construction in order to salvage its constitutionality, (Brief for Appellants ("Town Br.") at 47), is incorrect. The "federal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and *readily apparent*" from the face of the statute. *Boos v. Barry*, No. 86-803 (March 22, 1988) Slip Op. at 16 (1988) (emphasis added). *See also Grayned v. Rockford*, 408 U.S. 104, 110 (1972); *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972). The prohibition contained in the ordinance before the Court so broadly proscribes *all* residential picketing that no saving construction is "readily apparent."

[4] Indeed, due to the procedural posture of this case, appellees have not engaged in any "conduct" which would support an "as applied" challenge. Although appellees have engaged in residential picketing in Brookfield, this conduct occurred *prior* to the enactment of the ordinance in question. Appellees brought the instant action in order to restrain application of the ordinance to *future* conduct in which appellees desire to engage. In such circumstances, the nature of their past conduct is irrelevant to their facial challenge, except to the extent that the *fact* of their past conduct demonstrates that their desire to picket in the future is genuine. *See City of Houston v. Hill*, —— U.S. ——, 107 S. Ct. 2502, 2508 n.7 (1987); *see also* JA-24 (Plaintiffs' Proposed Statement of Uncontested Facts) ("Plaintiffs wish to engage in peaceful picketing on the public street in front of 750 Briar Ridge Road. Plaintiffs do not wish to trespass on private property, engage in unruly, violent, or disruptive conduct, interfere with the free passage of pedestrians and vehicles, make excessive noise, harass anyone, or otherwise engage in unreasonable conduct.")

This Court has frequently upheld facial challenges to broadly worded statutes that conflict with First Amendment requirements. See, e.g., *Lovell v. City of Griffin*, 303 U.S. 545 (1938); *Thornhill v. Alabama*, 310 U.S. 88, 96-98 (1940); *Saia v. New York*, 334 U.S. 558, 561-62 (1948).

More recently, the Court discussed the relationship of this "facial invalidity" theory to the "overbreadth" theory "that allows a litigant whose own conduct is unprotected [by the First Amendment] to assert the rights of third parties to challenge a statute, even though 'as applied' to him the statute would be constitutional." *Secretary of State of Md. v. J. H. Munson Co.*, 467 U.S. 947, 966 n.13 (1984).[5] The Court concluded that, regardless of whether a particular challenge of this kind

> should be called "overbreadth" or simply a "facial" challenge, the point is that there is no reason to limit challenges to case-by-case "as applied" challenges when the statute on its face and therefore in all its applications falls short of constitutional demands. [467 U.S. at 966, n.13]

See also Boos v. Barry, supra, Sl. Op. at 15 (sustaining, without regard to particular facts or conduct, facial First Amendment challenge to District of Columbia prohibition on displaying protest signs near a foreign embassy); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 787, 786-95 (1978), (sustaining, without regard to particular facts or conduct, facial First Amendment challenge to state law prohibiting business corporations from making expenditures to influence the outcome of referendum election questions which did not materially affect their property).[6]

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[5] In this case the appellees do not rely on the rights of third parties. Rather, appellees challenge the validity of the ordinance on the grounds that the ordinance unconstitutionally interferes with *appellees'* First Amendment rights.

[6] *First Nat'l Bank of Boston v. Bellotti*, also demonstrates that the "facial invalidity" analysis is not affected by the fortuity that

The sole question here, then, is the constitutionality of a broad prohibition on residential picketing *per se*, not the constitutionality of a ban on picketing *plus* noise, picketing *plus* trespass, or picketing *plus* obstruction of access to property. That prohibition is constitutional only if the First Amendment allows public authorities to banish a lone picket carrying a sign in a peaceful, orderly, quiet fashion from the streets of residential neighborhoods. Indeed, the Town admits as much in arguing:

> The complete ban on residential picketing is necessary to advance Brookfield's purposes. Even one picket is an unacceptable intrusion into the privacy of the person whose home is being picketed . . . . [Town Br. at 37.]

II. Streets In Residential Area As Public Fora.

A. Because this case concerns restrictions on free expression in an area—the streets of a town—which is maintained by the government for the use of the public and to which the public has free access, the problem presented is one that this Court has in recent years approached through a tripartite forum analysis. That approach was most recently summarized in *Airport Commissioners of Los Angees v. Jews for Jesus*, —— U.S. ——, 107 S. Ct. 2568, 1571 (1987):

> In balancing the government's interest in limiting the use of its property against the interests of those

the case may arise as a prospective challenge to a regulation rather than as an action to enforce that regulation. *See also City of Houston v. Hill, supra*, 107 S. Ct. at 2508 n.7 ("we have never required that a plaintiff 'undergo a criminal prosecution' to obtain standing to challenge the facial validity of a statute") (quoting *Doe v. Bolton*, 410 U.S. 179, 188, (1973)); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-33, (1975) (sustaining prospective facial First Amendment challenge to ordinance prohibiting topless dancing without regard to the particular facts regarding appellees' conduct prior to the enactment of the ordinance).

who wish to use the property for expressive activity, the Court has identified three types of fora: the traditional public forum, the forum created by government designation, and the nonpublic forum. *Perry Ed. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45-46 (1983). The proper First Amendment analysis differs depending on whether the area in question falls in one category rather than another. In a traditional public forum or a public forum by government designation, we have held that First Amendment protections are subject to heightened scrutiny: "In these quintessential public forums, the government may not prohibit all communicative activity. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. . . . We have further held, however, that access to a nonpublic forum may be restricted by government regulation as long as the regulation is reasonable and not an effort to suppress expression merely because officials oppose the speaker's views." *Id.* at 46.

Identifying in this typography the standards applicable to the present case is, one would think, a relatively simple matter. While there have been doctrinal difficulties in applying the tripartite forum analysis to various kinds of government property,[7] the one given has been that "streets, sidewalks, and parks, are considered, without more, to be 'public forums'." *United States v. Grace*, 461 U.S. 171, 177 (1983). The Court has uniformly recognized that streets and sidewalks are traditional public fora, where "the government's ability to permissibly restrict expressive conduct is very limited" (*id.*), whether those streets and sidewalks abut schools (*Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Grayned v. Rockford*, *supra*, the United States Supreme Court (*Grace*, *supra*), or foreign embassies (*Boos v. Barry*,

[7] *See* pp. 22-24 n.17, *infra*.

supra). In all of those instances, while the precise location has been recognized as a factor in determining the validity of any time, place and manner restriction (*see, e.g., Grayned v. Rockford, supra*, 408 U.S. at 116)[8], the location has not been a basis for holding that the public forum standards are *inapplicable*.

Indeed, this Court has expressly subjected streets and sidewalks in residential areas, as well as in commercial areas, to public forum analysis. Most prominently, *Carey v. Brown*, 447 U.S. 455 (1980), like this case, concerned picketing in residential neighborhoods; the parallel is so close that the ordinance at issue in *Carey* varied from the one in this case only in that the ordinance there permitted some, but not all, residential picketing. *Id.* at 457-59. And in *Carey* the Court began by determining that the public forum standards appicable to streets and sidewalks generally provide the pertinent principles:

> There can be no doubt that in prohibiting picketing on the public streets and sidewalks in residential neighborhoods, the Illinois statute regulates expressive conduct that falls within the First Amendment's preserve. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88 (1940); *Gregory v. Chicago*, 394 U.S. 111 (1969); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). "[S]treets, sidewalks, parks and other similar public places are so historically associated with the exercise of First Amendment rights

[8] "The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would."

> that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976) (quoting *Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968)).
>
> * * * *
>
> When government regulation discriminates among speech related activities *in a public forum*, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized. [447 U.S. at 460-62, emphasis supplied.]

See also, treating communicative activity in residential areas as entitled to full First Amendment protection, despite the privacy interest sasserted in such areas, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *cf. Martin v. Struthers*, 319 U.S. 141 (1943); *Schneider v. State*, 308 U.S. 147, 163-64 (1939).

Then, in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983)—where the tripartite forum analysis was first stated in its present form (*id.* at 45-46)—the Court pointed to *Carey* as one of the paradigm cases concerning a quintessential public forum:

> Public property which is not by tradition or designation a forum for public communication is governed by different standards [than quintessential public forum. . . . In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. . . . As we have stated on several occasions, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." [*United States Postal Service v. Council*

of Greenburgh Civic Assns., 453 U.S. 114, 129-30 (1981), quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976), in turn quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966)] . . .

* * * *

In *Mosley* and *Carey*, we struck down prohibitions on peaceful picketing in a public forum. . . . In *Carey*, the challenged state statute barred all picketing of residences and dwellings except the peaceful picketing of a place of employment involved in a labor dispute. In both cases, we found the distinction between classes of speech violative of the Equal Protection Clause. *The key to those decisions, however, was the presence of a public forum.* [460 U.S. at 46, 54-55 (emphasis added).]

B. Despite the seeming clarity of this Court's pronouncements upon the public forum status of residential, as well as commercial, streets and sidewalks, Brookfield, and the *amici curiae* aligned with the Town, maintain that this Court should now reverse itself, and declare that the streets and sidewalks of residential neighborhoods are not public fora. Town Br. at 21-28; Cities' Br. at 7-12. The consequence of such a pronouncement, of course, could be to allow municipalities not only to regulate picketing activity but to declare those streets and sidewalks off limits, entirely or on a content-selective basis, to any form of communication including, for example, handbilling and oral or written solicitation of funds. *Perry Ed. Ass'n*, *supra*, 460 U.S. at 45-46.

To evaluate this remarkable proposal, it is helpful to begin by recalling some very basic propositions about the purposes of the First Amendment generally, and the public forum doctrine particularly. As this Court recently had reason to note:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest

> and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 503-04 (1984). We have therefore been particularly vigilant to ensure that individual expression of ideas remain free from governmental imposed sanctions. . . . As Justice Holmes wrote, "[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the marketplace. . . ." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion). [*Hustler Magazine v. Falwell*, —— U.S. ——, 108 S. Ct. 876, 879 (1988).]

Hustler Magazine involved "a magazine of nationwide circulation." 108 S. Ct. at 877. It has long been understood, however, that "the common quest for truth and the vitality of the society as a whole" (*id.* at 879) cannot be perfected simply by preserving the right of those with control over, or access to, privately-owned mass media to communicate free of the fear of censorship. This Court has therefore been careful to assure that the government does not, whether in the guise of regulation of public property or otherwise, close out from participating in the ongoing public debate fostered by the First Amendment individuals who do *not* have access to the techologically complex—and hence costly—communication modes of modern society. The First Amendment law in this regard recognizes that

> The right to freedom of speech cannot exist in the abstract. It necessarily presupposes the right to communicate. In the absence of an effective and meaningful opportunity to reach the relevant audience, the theoretical right of expression would be

hollow. [Stone, *Fora Americana: Speech in Public Places*, 1974 Supreme Court Rev. 233, 245].

Thus, in *Schneider v. State*, *supra*, the Court protected the right of religious and political minorities to distribute pamphlets and other literature either to passerby generally or by going door to door in residential neighborhoods. The Court began from general First Amendment principles, and then proceeded to explain why special solicitude for the right of the ordinary citizen to freely communicate with his fellow citizens is essential to achievement of those principles:

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.
>
> In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of the democratic institutions. . . .
>
> . . . . As [we] said in [*Lovell v. City of Griffin*, 303 U.S. 444 (1938)], pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of people. . . To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at

> the very heart of the constitutional guarantees. [*Schneider v. State*, *supra*, at 161, 164.]

See also Martin v. Struthers, *supra*, 319 U.S. at 147 ("Door to door distribution of circulars is essential to the poorly financed causes of little people.")

The public forum doctrine, then, rests on an allegiance to the free circulation of ideas and information and it is that allegiance which defines its parameters. The designation of a few, well-defined public areas, available in almost every town in the nation, as areas presumptively available for First Amenrment activity serves as a minimal *guarantee* that communication among citizens is a use that must be accommodated in some public locations in some fashion:

> However many the limitations, a system of freedom of expression is more firmly founded when it rests upon the strongly held premise that a constitutional right to use the streets and open places is the starting point from which discussion of limitations begins. [Emerson, *The System of Freedom of Expression*, 304.]

The question here thus becomes how this "[t]raditional pubic forum property [that] occupies a special position in terms of First Amendment protection" (*Grace*, *supra*, 461 U.S. at 180) is to be defined and delimited.

1. It is helpful at the outset to demonstrate that the restrictive definition proposed on the appellants' side has no basis in this Court's decisions. The National League of Cities argues that public fora are only those particular areas in a particular municipality that "traditionally have been used or considered as places for public gatherings and protests" or "were designed, built, or designated . . . as a public forum for communication." Cities' Br. at 10; *see also* Town Br. at 27 ("Because it does not appear that the residential streets have ever been used for picketing, they are not a public forum for this purpose.") But the public forum concept in no way turns on

the largesse of the local government or on whether a picket is the first or the third individual to engage in that kind of communication on that specific street.

From *Hague v. C.I.O.*, 307 U.S. 496 (1939), to the recent public forum cases this Court has recognized that the areas presumptively available for expressive activity were not created for that special purpose, and are in fact devoted to multiple uses: Streets are for transportation (*Schneider v. State*, *supra*, 308 U.S. at 150; *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942), while parks are for recreation (*Hague*, *supra*, 307 U.S. at 505). As a general matter, then, neither streets nor parks are "designed, built, or designated" as communication facilities.[9]

Similarly, commercial streets and parks are no more "dedicated" by the government to expression than are residential streets. In neither cases does the local government typically consent to the use of business thoroughfares, or sidewalks abutting public buildings, for communicative activity. Rather, it is precisely because governments have repeatedly *refused* to consent to expressive use of streets and parks, and instead have asserted the right to ban such expression, that there have been a

[9] *See also*, e.g., *Schneider v. State*, *supra*, 308 U.S. at 160 ("Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which streets are dedicated"); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) ("Governmental authorities have the duty and responsibility to keep their streets open and available for movement"); *Niemotko v. Maryland*, 340 U.S. 268, 276 (1951) (Frankfurter, J., concurring) (the issue in cases concerning the dissemination of ideas in public places is "how to reconcile the interest in allowing free expression of ideas in public places with the protection of the public peace and of the primary uses of streets and parks"); *id.*, at 279 ("control of speech in streets and parks draws on . . . considerations [of] protection of the . . . primary uses of travel and recreation for which streets and parks exist".)

myriad of cases decided by this Court concerning prohibition of speech on public streets and parks.[10]

By disapproving those prohibitions, this Court has confirmed that "freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 513 (1969). And consistent with the view that public forum designation is not consensual, this Court has insisted that public forum status is nondefeasible; "the government [may not] transform the character of property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property." *Grace*, *supra*, 461 U.S. at 180.

Nor can the language of "tradition" in *Hague* and its progeny be read as a sort of adverse possession rule, permitting expressive activity only on those particular streets and in those particular parks where similar acticity happens to have occurred before. The public forum doctrine, as we have seen, is fundamentaly concerned with assuring the availability in every locale of public areas in which communication among citizens is safeguarded: it would make no sense for one individual's rights to turn upon whether other individuals with similar purposes had earlier seen fit to use precisely the same location.

[10] *See, e.g., Grace, supra* (ordinance prohibiting picketing on public sidewalk in front of Supreme Court building); *Carroll v. Princess Ann*, 393 U.S. 175 (1968) (prohibition of rally near courthouse steps); *Cox v. Louisiana*, *supra*, (prosecution for demonstration on public sidewalk in vicinity of courthouse); *Jamison v. Texas*, 318 U.S. 413, 415 (1943) (ordinance forwarding city's view "that it has the power absolutely to prohibit the use of the streets for the communication of ideas); *Schneider v. State*, *supra*, (same); *Hague*, *supra*, (ordinance denying right to hold public meetings in public streets and parks); *Davis v. Commonwealth of Massachusetts*, 167 U.S. 43 (1897) (ordinance forbidding public speaking in park).

Instead, the tradition referred to in the public forum cases is a generic one, based upon the common structural and functional elements which make streets and parks "natural and proper places for the dissemination of information and opinion." *Schneider v. State, supra*, 308 U.S. at 163. Those common elements were described by this Court in *Heffron v. Int'l Soc. for Krishna Consc.*, 452 U.S. 640, 651 (1981):

> A street is continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends. . . .

2. *Heffron's* description of a public forum fits residential streets even more closely than busy commercial thoroughfares.

First, streets, residential and commercial, are "continually open" both in the physical sense but, more important, in the additional senses that there is at all times free access to any member of the public, and that government permits a wide range of unregulated activity to go forward.[11] In residential areas, for example, children

[11] Without citation to the record (nor, as far as we are aware, any record support for the assertion), Broofield maintains that "[t]he residential streets in question have never been held open, by tradition or designation, to all members of the general public to congregate upon, regardless of their own place of residence and lack of business or social purpose for being there." Town Br. at 23-24. It is not clear whether this statement represents that Brookfield, unlike almost every other town in the nation, actually reserves use of its streets to residents and invitees, rather than leaving the streets open for vehicular and pedestrain traffic generally, or whether the point made is that no special invitation to outsiders, for expressive purposes or others, has issued. In either event, as a factual statement with no predicate in the record of the case, it should be disregarded.

Further, insofar as this statement indicates that Brookfield actually limits entry into its residential neighborhoods to residents and invitees, the representation is entirely inconsistent with the

may play, neighbors may meet to exchange information about the new gardner or the latest national news, and an out-of-town bicycle club may circle the streets in a large group on Saturday mornings.

The primary result of this "openness" is that streets are locations in which at least some communicative activities are easily accommodated by applying the communication-neutral rules used to accommodate other non-transportation interests without disrupting the transportation purpose of the property. Consequently, *simply by not discriminating against communication*, government can usually accommodate a variety of expressive activity on the streets.[12] For the most part, then, on streets, including residential streets, as in parks, communication between citizens can be protected by applying the principle that "one who is rightfully on the street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in

Town's representation (also made without any citation to the record) that "[p]rotestors have not been barred from the residential neighborhoods." Town Br. at 41. Finally, if Brookfield indeed attempted to "privatize" the public streets in this manner, it would run afoul of this Court's rule that government "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums. . . ." *Grace, supra*, 461 U.S. at 180.

[12] The Town and its *amici curiae* make much of the fact that the particular subdivision involved in this case (but not necessarily, it appears from the affidavits and proposed stipulated facts, all the residential areas of Brookfield) has no sidewalks. But the result of this circumstance is in some respects quite the opposite to that the Town suggests: Because there are no sidewalks, it must necessarily be the case that a certain amount of pedestrian activity—including, in all likelihood, jogging, ball playing, and chatting—takes place in the street, and that the subdivision can do without sidewalks precisely because the street is so lightly traveled that nonvehicular uses are easily accomodated. The same would not be true, of course, of an interstate highway. But precisely for that reason, playing ball in the middle of that highway would presumably be illegal.

an orderly fashion." *Jamison v. Texas, supra*, 318 U.S. at 416.[13] And where this is not the case, it will often turn out, upon analysis, that the governmental interest at stake is, in truth, precisely the suppresison of the communication that is anathema under the First Amendment. Given the nature of streets, it is all but unimaginable that there will be many circumstances in which there is a legitimate interest in regulating expressive activity *alone* and not any of the myriad other uses of the street.[14]

The second element underlying the designation of streets, and not most other public locations, as quintessential public fora is that a street, including a residential street, is "a necessary conduit in the daily affairs of a locality's citizens, [and] also a place where people may enjoy the open air or the company of friends." *Heffron, supra*, 452 U.S. at 651. As a consequence, a street is an area in which an individual seeking to communicate is likely to find an audience of at least some

[13] In limited circumstances the public forum doctrine encompasses, in addition to this nondiscrimination rule, some governmental obligation to permit expressive activity even when it would be legitimate to ban other (nonexpressive) activity because of the disruption that would be caused. For example, parades do stop the flow of traffic, and presumably a city could arrest as rioters large groups of people without any communicative purpose who swarmed onto the street, thereby stopping traffic. Nonetheless, while the right to engage in large group demonstrations in the streets may be tightly restricted (*Cox v. New Hampshire*, 312 U.S. 569 (1941)), it does not appear that parades may be forbidden entirely. *Gregory v. City of Chicago*, 394 U.S. 111 (1969). *See generally* Kalven, *The Concept of the Public Forum*, 1965 Supreme Court Rev. 1.

[14] *See Schneider v. State, supra*, 308 U.S. at 104 ("Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.")

individuals with the time and inclination to consider his message. Moreover, by choosing his street location, a speaker can focus his communication upon those he most wants to convince, thus avoiding the wasteful dispersal of the message to uninvolved and unconcerned listeners.[15] And since there must be access to nearly every place that people live and work, designating streets in general as public fora means that a fairly wide choice of locations for communication are available, so that there may be little need to open up a wide variety of other government-owned areas as well.[16]

In short, looking at the matter in light of the public forum doctrine's purposes, residential streets share those functional elements that make a place a proper public forum. The streets are ideal locations for communication between ordinary citizens on important issues, in pursuit of the First Amendment's large goals of the free,

[15] Here, for example, as in *Carey v. Brown, supra*, and *Organization for a Better Austin v. Keefe, supra*, the desire was apparently to communicate with the neighbors of a person with whom the pickets have a profound ideological disagreement, presumably in the hope that the neighbors might have some influence on that person.

[16] Obviously, this interest would not be served by excising residential streets from the quintessential public forum category. To the contrary, as Judge Swygert noted in his eloquent panel opinion below, vacated when an en banc hearing was granted:

> A holding that streets located in residential areas are not public forums would represent a radical departure from the general direction of first amendment jurisprudence. Such a holding would effectively place vast areas of this country out of the reach of the first amendment. Indeed, if streets like that fronting Dr. Victoria's home are not protected by the first amendment, then primarily residential towns, like Brookfield, may effectively confine the right of their citizens to be exposed to a diversity of views on issues of public concern to those tiny areas of the community classified as "commercial" or "governmental." [807 F.2d 1339, 1347.]

open interchange of ideas unrestricted by government control. This Court should therefore reaffirm in this case its longstanding and oft-repeated principle that on public streets, "the government's ability to permissibly restrict expressive conduct is very limited". *Grace, supra*, 461 U.S. at 177.[17]

[17] Given the analysis presented in the text and this Court's oft-stated holding that streets generally, including residential streets, are quintessential public fora for First Amendment purposes, we consider only briefly the analysis applicable should this Court accept the invitation to exclude residential streets from the public forum category.

The tripartite forum analysis discussed in the text is simply "a workable analytical tool" (*City Council v. Taxpayers for Vincent*, 466 U.S. 789, 815, n.32 (1984)), a "means of determining when the government's interest in limiting the use of its property to its intended purposes outweighs the interest of those wishing to use the property for other purposes" (*Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 800 (1985)). For that reason, "in cases falling between the paradigms of government property interests essentially mirroring analogous private interests and those clearly held in trust, either by tradition or recent convention, for the use of citizens at large", the forum analysis may not be helpful. *Taxpayers for Vincent, supra*, 466 U.S. at 815 n.32.

For example, as this Court noted in *Airport Commissioners of Los Angeles, supra*, 107 S. Ct. at 2571, "at least one commentator contends that [the deferential standard for nonpublic fora] does not control a case . . . in which the [speakers] already have access to the [forum], and therefore concludes that this case is analogous to *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)." As that commentator stated:

> When citizens claim a right to enter government property for the particular purpose of speaking, it is relevant to ask whether other speakers have been allowed the same privilege, or whether the property is especially appropriate for speech. The various versions of the public forum doctrine address these questions. But public forum analysis is irrelevant when access is not the issue. When citizens are going about their business in a place they are entitled to be, they are presumptively entiled to speak. [*See Jamison v. Texas*, 318 U.S. 413, 416 (1943)]. Because students were indisputably entitled to be on the school grounds, the only question in *Tinker* was whether the school had a constitutionally sufficient reason to suppress their speech. [Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 N.W. L. Rev. 1, 48 (1986).]

III. Regulation Within the Public Forum

To conclude that the attempt to vastly narrow the public forum doctrine must fail is hardly to determine the validity of the regulation at issue in this case. While

While *Airport Commissioners of Los Angeles*, did not determine "whether the [deferential review] standard is applicable when access to a nonpublic forum is nonrestricted," (107 S.Ct. at 2571), the Court did apply a somewhat similar distinction to that suggested in the Laycock article in *Hazelwood School District v. Kuhlmeier*, —— U.S. ——, 108 S. Ct. 562 (1988). In that case, the Court first determined that schools generally are not traditional public fora, and that there was no intent on the part of school officials to permit indiscriminate use of the school newspaper there at issue by students. 107 S. Ct. at 567-69. The Court therefore held with respect to the school newspaper that "school officials were entitled to regulated the contents of Spectrum in any reasonable manner." *Id.* at 569. At the same time, the Court maintained that:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. . . . Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.

Thus, *Hazelwood School District* recognized that even if a governmental-owned or controlled location or activity is *not* a traditional public forum, there are still instances in which denials of the right to speak must be treated, for First Amendment purposes, as analogous to censorship, and subjected to careful scrutiny rather than simply to a reasonableness review. Those circumstances,

the precise formulation has varied in recent years, the general principle is that government may regulate the time, place and manner [18] of expression in a public forum

the reference to *Tinker*, *supra*, indicates, involve situations in which the individuals seeking to speak are otherwise lawfully present on the property in question, and in which they are not asking for any special governmental action fostering speech, but simply to be judged by the same standards of conduct applicable to those lawfully present on the premises but not seeking to engage in communicative activity. Since that is the case here, the statute in question, which proscribes peaceful picketing without regard to whether the picketing is in any wayay disruptive (*compare Grayned v. Rockford*, *supra*), is invalid on its face whether or not the street in question is a public forum.

[18] It is worth noting that this phrase is often used but has never been further defined or elaborated. While a "time" restriction is fairly self-evident and is readily distinguishable from complete exclusion of a mode of expression from a forum, regulations characterized as "place" and "manner" restrictions can also be characterized as complete exclusions from a more limited forum. For examle, if the "forum" in this case is the particular street upon which Dr. Victoria lives, the exclusion of picketing is complete; in contrast, a "place" restriction that kept the pickets to within five feet of the curb, for safety reasons, would not be a complete exclusion even from the forum, narrowly defined. In contrast, if the "forum" is the town of Brookfield as a whole, the exclusion is not complete.

Similarly, because *all* picketing is banned ,and not just disruptive, noisy, or trespassory picketing, the regulation can be denominated a complete exclusion of one mode of communication from a forum, and not simply a "manner" restriction. The Town, however, seems to view the restriction as one of "manner" because other means of communicating the same message to the same audien— handbilling, for example, or door-to-door solicitation—are permitted.

As to both these problems, the premises of the First Amendment public forum doctrine suggest that the autonomy of the speaker in choosing his basic location and method of communication should be given priority, and that the burden on the government to justify its regulation should increase the more the speaker is required to depart from his desired place and means of communication.

In particular, where a purported "place" restriction means that speakers must address themselves to a much larger audience than

as long as the regulation both has a sufficient nexus to a significant state interest and leaves open ample alternative channels for communication of the ideas sought to be conveyed. *Heffron*, *supra*, 452 U.S. at 648; *Grace*, *supra*, 461 U.S. at 181.[19]

Brookfield here asserts two interests: one in the safety of its streets, and one in the privacy and tranquility of its residential areas. As Judge Swygert noted below (807 F.2d at 1351), the safety interest is in no way a significant one; as far as the evidence indicates, even the large number of pickets who participated before the picketing ordinance was enacted did not constitute any traffic hazard upon what must be a seldom-travelled road, and certainly the lone picket who would violate the ordi-

the one the speakers seek to reach in order to get their message across, the government should have to demonstrate a more substantial interest to justify the restriction. Similarly, while some means of communication may be sufficiently different from others to qualify the more restrictive regulation of one than another as-mere "manner" restrictions, transformations from face-to-face to less direct modes of communication so intrude upon the speaker's ability to fashion his own message as to be indistinguishable from direct censorship, and should be treated as such.

[19] There has been considerable discussion in recent opinions regarding whether the "time, place, and manner" doctrine encompasses the "less-restrictive-alternative" approach. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). There well may be a difference in this regard depending upon whether the regulation is one applicable alike to those seeking to communicate and to others, as in *Clark*, or whether the regulation explicitly targets communicative activity. In the former instance, the speaker is in effect seeking a special privilege because of his First Amendment rights, and it may be an appropriate answer that speakers are not normally entitled to such a privilege if the regulation is evenhandedly applied across the board. In the latter instance, however, there is little to distinguish the regulation from direct censorship of speech, and a stricter level of scrutiny should therefore apply. In any event, the dispute is not here relevant, since, as shown in the text, the picketing regulation does not substantially advance any significant state interest.

nance would not, without more, constitute such a hazard. Moreover, a picket, as such, presents no safety danger different from that inherent in many other uses of the streets common in residential neighborhoods; since a proscription upon actual obstruction has been determined to be sufficient to cope with the possible traffic dangers posed by all other pedestrians, no reason appears why there is a significant state safety interest in more closely regulating pickets.

The question then becomes whether there is some significant legitimate interest in privacy substantially forwarded by the statute. In order to evaluate the significance and legitimacy of this asserted interest, it is necessary to be considerably clearer about what that interest is than the Town has been heretofore.

The privacy interest actually asserted by the preamble to the ordinance is one that focusses upon the reactions of the *target* of the picketing. Jurisdictional Statement, App. E ("the practice of picketing before or about residences and dwellings causes emotional disturbances and distress to the occupants"). It is understandable that individuals would rather not have their pursuits blasphemed before their neighbors. But there is no legitimate governmental interest in protecting the flow of information on a matter of public interest, simply because the individual who is criticized feels aggreived or coerced.

This Court so held in *Organization for a Better Austin v. Keefe*, where the pertinent facts were precisely analogous: handbillers were informing a real estate agent's neighbors that he engaged in blockbusting, as a pressure tacite to convince him to cease doing so. The Court held that there is no legitimate governmental interest in ending the real estate agent's discomfort, which was a direct result of the communication itself:

> The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent by their activities; this is not fundamentally different from the function of a newspaper. . . . Petitioners were engaged in openly and vigorously making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptablity. . . .
>
> Designating the conduct as an invasion of privacy is not sufficient. . . . *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) . . . is not in point [because] respondent is not attempting to stop the flow of information into his own household, but to the public. [402 U.S. at 419-20.]

See aso Hustler Magazine v. Falwell, supra.

While there are at least two more aspects of the picketing that could be said to violate "privacy" interests, neither falls within the asserted purpose of the ordinance and neither should therefore be considered as a legitimate justification. It is nonetheless worth examining each in the interest of completeness and showing that those interests, while legitimate, are not significantly forwarded by the ordinance. *See* Stone, *Fora Americana: Speech in Public Places*, 1974 S. Ct. Rev. at 263, discussing essentially two varieties of privacy interests in the public forum context; *viz.*, protection from exposure to ideas, and protection from disturbances due to the particular means of communication.

In this instance, the latter interest is plainly not substantially forwarded by the regulation. For, as we have seen, the ordinance prevents picketing even when it is perfectly peaceful, quiet, nonobstructive, and nontrespassory, and even though there are other ordinances

that ban directly the possibly annoying side effects of picketing.[20]

Nor do the neighbors of the picketed person have a significant interest in being spared from the pickets' message, whether that message is the one on their signs or the one conveyed by their simple presence. Unlike a ban on sound trucks, midnight telephone calls, or offensive television or radio programs, the ban here is not limited to intrusions into the home. And outside the home,

> [t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of person predilections. [*Cohen v. California*, 403 U.S. 15, 21 (1971).]

Here, the ordinance applies without regard to any such focussed interest balancing. Again, picketing is proscribed regardless of the message communicated; and while the message that was communicated may well have been offensive to many of the neighbor's, there is no doubt that—and the Town concedes—the message is one that could not have been banned had it been communicated in precisely the same way on the Town's sole commercial street, where more people may have seen it.

In short, there is no significant interest that is substantially forwarded by this ban on communication, and the ban is therefore invalid without more.

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[20] Nor is there any legitimate separable interest in eliminating an inchoate fear of unknown strangers near one's house. The door-to-door solicitation cases make that clear. *Martin v. City of Struthers, supra; Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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